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No. 06-856

FILED
SEP 11 2007
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 statement is included in the Brief in Opposition of the Petition of Writ of *Certiorari.*

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondent DeWolff, Boberg & Associates, Incorporated ("DeWolff") is a management consulting firm. DeWolff sponsors and administers Respondent DeWolff, Boberg & Associates, Incorporated, Employees' Savings Plan ("the Plan"). The Plan is a retirement plan maintained pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et. seq.*, and the Internal Revenue Code, and commonly known as a 401k plan. Petitioner James LaRue ("LaRue") was employed by DeWolff for several years and was a participant in the Plan. LaRue remained a participant in the Plan after he resigned from DeWolff in 2001. LaRue's status changed in July, 2006, two years after

this action was initiated, when he took a complete distribution of his interest in the Plan.[1]

LaRue alleges that, on two occasions in 2001 and 2002, he requested that changes be made to his investment allocations in mutual funds available to plan participants. He claims neither request was implemented, for reasons not explained and in circumstances not mentioned. In a complaint filed on June 1, 2004, two years after the second of these alleged requests, LaRue brought a civil action for breach of fiduciary duty against DeWolff and the Plan for failing to follow his investment directions. The complaint sought relief only under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), alleging that Respondents' fiduciary breach caused his interest in the Plan to be "depleted" by approximately $150,000. The complaint sought neither an injunction nor any other form of traditional equitable relief. BIO App. 4a.

The complaint alleged only that "Plaintiff directed the plan, by and through its' [sic] appointed agents and administrators, to invest his money and contributions in a certain way." BIO App. 3a. LaRue did not identify the entity allegedly responsible for failing to follow his directions. Neither did the complaint allege whether that entity is an ERISA fiduciary with respect to those transactions.[2] The complaint gave no

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[1] The Petition is thus incorrect in stating that LaRue is a "participant" in the Plan. Pet. for Cert. 5, 8. Lower courts are split on the question of whether a former employee who has cashed out of a 401k plan for reasons unrelated to the alleged breach of fiduciary duty can continue to maintain a claim under ERISA's civil enforcement provisions. *See infra* pp. 26-28. This issue, addressed in Respondents' pending motion to dismiss the writ, MTD 3-6, illustrates the problems presented if the Court were to conclude that ERISA § 502(a)(2) can be extended to an individual claim for compensatory damages.

[2] ERISA's fiduciary duty rules do not extend to ministerial actions, whether engaged in by employer plan sponsors, the plan itself, or service providers to the plan. *See infra* pp. 18-20.

reason why his requests were not implemented. LaRue did not claim any misrepresentation on the part of either DeWolff or the Plan in connection with the requests. The complaint alleged no plot or scheme by either DeWolff or the Plan to interfere with the requests. The complaint suggested no systemic failure in plan administration that caused his requests to be disregarded. The complaint thus argued that LaRue's requests were either lost, delayed or ignored in what can only be viewed as a simple case of miscommunication, or perhaps negligence.

Further the complaint did not allege that LaRue had been hindered in checking his account to ascertain whether his directions had been followed. There is no suggestion LaRue took any steps to confirm that his funds had been re-invested, and if not, to determine the reason for the delay. The complaint does not explain why LaRue waited two years—time to see how the stock market reacted after the alleged requests—before suing for monetary relief in the form of lost profits.

Moreover, because LaRue had not taken a distribution from the Plan, the complaint alleged no actual losses. The complaint claimed only that his account had been "depleted" in the amount alleged. The complaint nowhere claimed that any other plan participant was affected by the alleged failure to process his requests. Finally, the complaint alleged no ill-gotten gains by either DeWolff or the Plan.

Because LaRue invoked only § 502(a)(3) in the complaint, LaRue did *not* enter the Plan document into the record. The complaint thus did not identify any provisions in the Plan that would be relevant to determining how the alleged loss to LaRue's individual account would be treated under the Plan, or whether the alleged "depletion" would have any impact on other plan participants. This omission also prevents an assessment of whether there is a basis in the language of the

Plan to warrant the characterization that a recovery in this case would produce an incidental benefit to the Plan.[3]

Respondents answered the complaint. The answer denied that LaRue made one of the two cited requests. *See infra* pp. 2a-3a. Respondents conceded that the other request was made. Respondents asserted, *inter alia,* that LaRue rescinded that request shortly after it was made, presumably because market fluctuations made it more profitable for him to cancel the transaction. *See infra* pp. 2a-3a. Both Respondents denied that either of them was acting in a fiduciary capacity in connection with the alleged requests. *Id.*

Respondents moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Respondents asserted that the monetary relief sought by LaRue constituted compensatory damages in the form of lost profits that are not available under § 502(a)(3).

The district court granted Respondents' motion and dismissed the case with prejudice. Pet. App. 15a-21a, 30a-31a. The court held that LaRue's attempt to recover the estimated amount his plan account might have earned, was not equitable relief. The court explained that the money damages LaRue sought could only be characterized as a claim for lost profits: "[t]he $150,000 never belonged to plaintiff because it represents potential value, not actual earnings; as such, there is nothing to restore. Nor is the amount in the defendants' possession. Awarding plaintiff $150,000 as restitution would

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[3] LaRue attached the Plan's Summary Plan Description as Exhibit A to the Complaint, erroneously asserting that it was the Plan Document. BIO App. 2a. LaRue repeats that error in his presentation to this Court, citing to the summary plan description and implying that it is the same as the Plan document. *See* Pet. Br. 17-18. LaRue's failure to include the Plan document in the record renders speculative various arguments made by LaRue and his *amici*, attempting to re-characterize this case as presenting a cognizable claim under § 502(a)(2), based on assumptions as to the language in, and actual operation of, the Plan. *See infra* pp. 21-23.

impose personal liability on defendants." Pet. App. 17a. Thus, the court found that it could not fashion any relief that would be "consistent with the guidelines of *Great-West, Rego* and *Sereboff*" under § 502(a)(3). BIO App. 44a.

LaRue appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court. Pet. App. 1a-14a. The Fourth Circuit held that LaRue's claim failed because he did not seek equitable restitution as the funds he sought were not in Respondents' possession. The court reasoned that LaRue was seeking legal remedies "gauge[d] . . . by the value of his own loss," and, "[t]hat plaintiff can analogize this suit to a common law breach of trust action . . . proves no avail in characterizing the relief he seeks as equitable." *Id.* at 10a-11a. The court then addressed the ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), claim, which was raised for the first time on appeal. The court held that "[e]ven if the argument were not therefore waived," LaRue could not recover under a § 502(a)(2) theory. Pet. App. 5a. The court explained that LaRue sought "recovery of the amount by which his account would have appreciated had defendants followed his instructions." Pet. App. 2a. Having found that LaRue was seeking his own lost profits, the court stated, "[i]t is difficult to characterize the remedy plaintiff seeks as anything other than personal." Pet. App. 6a. Thus, since LaRue sought "to particularize the recovery to himself" as opposed to seeking a benefit that would inure to the Plan as a whole, the court held that LaRue's § 502(a)(2) theory failed as well.

LaRue then filed a petition for rehearing and rehearing *en banc*; the United States Secretary of Labor filed an *amicus curiae* brief in support of that petition. The Fourth Circuit rejected the arguments made by the Secretary, and denied the request for rehearing and rehearing *en banc*. Pet. App. 22a-29a. The Secretary argued that § 502(a)(2) allowed an individual to bring a claim on his own behalf. The court disagreed, stating "Neither the text of Section 502(a)(2) nor

Supreme Court precedent contemplate a remedy for individual, rather than plan, losses." Pet. App. 24a. The court noted that all of the authorities cited by the Secretary involved a subclass of participants and not an individual participant. The court went on to say that adopting the Department of Labor's "expansive view" of the statute would "recalibrate the balance" between Congress' desire to "provide fair and generous remedies for plan participants without imposing ruinous personal liability on plan fiduciaries." Pet. App. 2a, 28a. Concluding that it was not its role to expand the statute beyond Congress' intent, the court denied the request for rehearing.

LaRue petitioned for *certiorari*. After requesting the views of the United States, and having been apprised of those views, this Court granted the petition with respect to both the § 502(a)(2) and § 502(a)(3) questions. After the petition was granted, Respondents filed a motion to dismiss the writ because it had not been made clear in the petition that, after the Fourth Circuit's decision, LaRue had withdrawn from the Plan. That motion, which argues that LaRue's decision to cash out of the Plan fundamentally changes the nature of the issues presented to this Court, remains pending on the date of this brief.

SUMMARY OF ARGUMENT

Petitioner asks this Court to reconsider or overrule seminal decisions on two separate issues of statutory construction. And the outcome urged by the Petitioner is irreconcilable with the Court's decisions in a third line of cases involving the same statute. The Court should reject Petitioner's invitation.

LaRue and his *amici* ask the Court to reconsider its decision in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), by permitting LaRue to start over in the district court with a claim under § 502(a)(2). *Russell* is

widely understood to bar claims for purely individual recovery of damages brought under § 502(a)(2). In *Russell*, the Court's careful analysis of the text, legislative history and purpose of ERISA led to the conclusion that § 502(a)(2) is limited to actions brought for "the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. This case provides no basis for the judicial invention of a brand new cause of action under § 502(a)(2). The claim was not litigated in the district court and comes to this Court without the benefit of a fully developed record. On the merits, the case involves the paradigmatic situation of an individual loss, which cannot reasonably be characterized as "losses to the plan" within the meaning of § 409 and § 502(a)(2). The Court should reaffirm *Russell* to make it clear that an attempt to seek an individual damages recovery is not available under § 502(a)(2).

The claim LaRue actually brought in the district court, for monetary damages under § 502(a)(3), fares no better. Following this Court's decisions in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993) and *Great-West Insurance v. Knudson*, 534 U.S. 204, 209 (2002), it is settled that a claim for money damages is not available under § 502(a)(3), which permits only the recovery of "appropriate equitable relief." The efforts by LaRue and his *amici* to re-characterize his claim for lost profits, the quintessential claim for damages at common law, into a claim for equitable relief, are unavailing. LaRue's suggestion that *Mertens* should be overruled is unwise. LaRue's further assertion that his claim for damages is really a claim for equitable relief because it could be relabeled as a claim seeking a surcharge against the Plan's fiduciaries falls of its own weight. The fact that an equity court in the days of the divided bench may have been empowered to award monetary relief against a trustee does not transform the nature of that remedy. Nor does the occasional availability of such relief make it "typically available." LaRue's recitation of the remedies available in 18th century England confirms that such a

remedy was the exception to the general rule that claims for monetary relief were not "typically available" in equity.

LaRue seeks an outcome that would be irreconcilable with this Court's ERISA preemption cases. In a series of decisions over thirty years, running from *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) through its unanimous decision three years ago in *Aetna Health v. Davila*, 542 U.S. 200 (2004), the Court has decided that ERISA preempts a wide variety of state law-based claims brought against parties involved in the administration of employer-sponsored welfare benefit plans. These decisions are based on the recognition that state law claims against sponsors of ERISA plans are preempted precisely because they seek remedies not available under § 502, which provides the exclusive means for remedying alleged violations of ERISA. In the wake of these decisions, it would be a surprise to learn that such claims for damages were available all along under ERISA itself.

A decision permitting LaRue's claim to proceed would yield an outcome flatly inconsistent with both the text and the objectives of ERISA, with respect to both retirement and welfare benefit plans. The Court has made clear that ERISA is a "complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. The same policy decisions animating this Court's preemption case law—the concern expressed by Congress that ERISA should not discourage the voluntary formation of employee benefit plans by imposing additional costs on plan sponsors—apply with equal, if not greater, force to the administration of 401k plans. Defined contribution plans are increasingly replacing traditional defined benefit pension plans as the principal vehicle for employers who choose to offer retirement plans for their employees. Encouraging employers to continue to maintain such plans is a cornerstone of the public policy of encouraging employees to save for retirement. Congress

surely did not intend an outcome that would open the same door the Court just closed in connection with claims against health plan sponsors and managed care companies, and permit that same torrent of litigation to be brought against sponsors of defined contribution retirement plans and their service providers.

ARGUMENT

I. BECAUSE THIS CASE DOES NOT INVOLVE "LOSSES TO THE PLAN" WITHIN THE MEANING OF SECTION 409, THE COURT SHOULD REJECT THE SECTION 502(a)(2) THEORY AND AFFIRM THE FOURTH CIRCUIT

A. Congress Provided for only Certain Remedies in ERISA Cases

ERISA's civil enforcement scheme consists of "six carefully integrated civil enforcement provisions." *Russell*, 473 U.S. at 146. This Court has repeatedly emphasized that Congress' deliberate care in expressing ERISA's enforcement scheme "provide[s] strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell*, 473 U.S. at 146 (emphasis in original). *See also Great-West*, 534 U.S. 204; *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 247 (2000); *Pilot Life*, 481 U.S. at 54. The Court has been equally consistent in its reluctance to tamper with ERISA's enforcement scheme because "'[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" *Russell*, 473 U.S. at 147 (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981)). In *Pilot Life*, the Court reaffirmed the teaching of *Russell* that the exclusivity of § 502(a)'s remedial provisions is consistent

with both ERISA's plain language and its legislative history. *Pilot Life*, 481 U.S. at 54-55.

ERISA's "complex and detailed" statutory scheme "resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. In determining whether a particular remedy is authorized by § 502(a), courts "have to take account of competing congressional purposes" in enacting ERISA, including Congress' "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers" from offering benefit plans in the first place. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78-81 (1995)) and *Mertens*, 508 U.S. at 262-63. *See also Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (ERISA does not require employers to establish employee benefit plans or a certain level of benefits under a plan); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003).

LaRue expresses his general view of the statutory purpose, but this Court has recognized in this context that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens*, 508 U.S. at 261. Unlike statutes such as Title VII, the remedial purpose of § 502(a)(2) is "not to make the aggrieved employee whole." *Millsap v. McDonnell Douglas*, 368 F.3d 1246, 1260 (10th Cir. 2004) (citing *Mertens*, 508 U.S. at 253, 261-62 and *Russell*, 473 U.S. at 138, 142, 148). *See also Chauffers, Teamsters and Helpers, Local 391 v. Terry*, 494 U.S. 558, 572 (1990) (distinguishing between Title VII, which is "restitutionary in nature," from claims arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 seeking damages for violation of the duty of fair representation).

In language particularly relevant to this case, this Court has stated that "[a] fair contextual reading of the statute makes it

abundantly clear that its draftsmen were primarily concerned with . . . *remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.*" *Russell*, 473 U.S. at 141 (emphasis added). The fact that the remedies provided by the statute are insufficient to remedy every conceivable wrong is, therefore, a simple reflection of the political compromises and policy judgments made by Congress.

The arguments made by LaRue and his *amici* rest on the contrary assumption that Congress would have wanted to remedy every wrong that conceivably could befall an individual plan participant or beneficiary. The legal theories advanced by LaRue thus proceed from the premise that the "carefully integrated civil enforcement provisions" of ERISA should have no gaps. With that premise, LaRue and his *amici* apparently believe it is easier to interpret the words of the statute to support a compensatory damages remedy here, in what the lower courts correctly called a claim for lost profits arising out of simple negligence.

LaRue asks the Court to stretch ERISA to provide a compensatory damages remedy for every alleged ERISA wrong. The Court has heretofore rejected such a construction of § 502, it being widely understood that ERISA does not provide a complete package of remedies. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 836 (1988) (observing that Congress decided to limit state law garnishment claims against ERISA pension plans and not welfare plans); *Davila*, 542 U.S. at 222-23 (Ginsburg, J., concurring). *See* Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise*, 81 Iowa L. Rev. 1, 19 (1995) ("A number of gaps exist in [section 502] enforcement pro-visions"); Jay Conison, *Suits for Benefits under ERISA*, 54 U. Pitt. L. Rev. 1, 7 (1992) (suggesting that ERISA "leaves huge gaps in the regulation" of certain aspects of employee benefit plans). This case is a poor candidate for a dramatic reinter-pretation of the statute.

At issue is nothing more than a supposed request that someone change an individual's mutual fund investment allocation. There was no judgment to be exercised in processing the transaction; the direction was ministerial in nature. There was no question of self-interest, bad faith or improper motive on behalf of either DeWolff or the Plan. *Cf. Varity Corp.*, 516 U.S. at 493. The essence of the claim is no more than an apparent miscommunication in connection with a matter affecting only one individual's plan account.

Moreover, there is no suggestion of any loss—in the sense of an actual out of pocket loss—to LaRue. *Rego v. Westvaco Corp.*, 319 F.2d 140, 146 (4th Cir. 2003) (ERISA claim failed where it "in no way correspond[ed] to any out of pocket loss"). LaRue's investment in the mutual funds held at the time of the alleged requests certainly was not "lost;" there is no allegation that the plan administrator took any affirmative action that reduced the value of LaRue's individual plan account. Rather, the plan administrator (or one of its agents) is alleged to have failed to act on an investment direction that, if taken, would ostensibly have resulted in *greater profits* for LaRue. The validity of that claim, in turn, requires one to make the additional assumption that LaRue would have "beat the market" with his subsequent investment choices. (Of course, if the miscommunication resulted in a benefit to LaRue, *i.e.*, if his proposed investment reallocation did not turn out to be favorable because the share prices in the intended mutual fund investments dropped—it is safe to assume LaRue would never have brought this claim, content to leave unremedied the ostensible failure to follow his instructions). *See Steinman v. Hicks*, 352 F.3d 1101, 1104 (7th Cir. 2003) (Posner, J.) (affirming district court's finding of no § 502(a)(2) violation, noting that "no one could know" at the time of the transaction at issue how the stock and bond markets would eventually value the acquiring company's stock). In any event, the claim is purely one of speculative lost profits that no one—certainly not DeWolff or the Plan—

ever realized. It is thus a demand for lost profits universally regarded as a classic remedy at law.

LaRue claims neither obstinance nor an affirmative lack of due diligence by either DeWolff or the Plan. He simply claims to have given an investment instruction; he does not claim to have been misled by subsequent reports that his instructions had in fact been followed. Nor does the complaint allege any other circumstances that might justify his failure to seek the obvious equitable remedy available to him—an injunction to force the plan administrator to ensure the mutual fund trade was executed. LaRue does not even claim to have examined his account to confirm that his instructions were implemented. LaRue just claims to have asked someone to make a change in his investment accounts that now, in hindsight, he thinks would have been a good one. This is precisely the kind of "heads I win, tails you lose" damages claim that Congress could reasonably believe should not be permitted.

Congress explicitly rejected language contained in an earlier version of § 502 that would have permitted the recovery of legal as well as equitable damages. *Russell,* 473 U.S. at 146, n.14.[4] Congress thus recognized that permitting suits of this type would have obvious negative consequences for plan sponsors and their service providers, to the detriment of

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[4] ERISA is thus materially different in this respect from the Labor Management Disclosure and Reporting Act of 1959 (LMRDA), 29 U.S.C. § 400 *et seq*, which, *inter alia,* codified certain trust law principles in establishing fiduciary standards for officers of labor union. Unlike ERISA, the civil enforcement provision of the LMRDA, 29 U.S.C. § 501(b), expressly authorizes recovery of "damages" as well as "other appropriate relief." *See Guidry v. Sheet Metal Workers Pension Fund,* 493 U.S. 365, 375-76 (1990). Because Congress is presumed to legislate purposefully against the backdrop of existing law, *see Cannon v. Univ. of Chicago,* 441 U.S. 698 (1979), Congress' failure to include the term "damages" in § 502(a)(3) is thus significant.

ERISA's goal of encouraging plan formation. This type of suit requires no evil intent or bad faith, of the kind that a good faith plan administrator could knowingly avoid. It requires no conscious decision by a plan fiduciary. Rather, it involves an allegation of—at most—simple negligence through omission. According to LaRue, the purported remedy for this omission is not return of money improperly generated (as in equitable restitution), but rather damages in the form of lost profits.

Such large scale liabilities for an ordinary administrative mistake in connection with ministerial tasks to be performed by plan administrators or their agents would surely be seen as imposing significant costs on employer-sponsored plans. Individual plan participants in 401k plans would be able to exercise 20/20 hindsight and sue for damages in a variety of "he said/she said" circumstances. Plan sponsors could expect a torrent of litigation from individual plan participants unhappy with their investment returns over time. Plan sponsors and their service providers would face increasingly expensive fiduciary insurance policies to cover such routine ministerial mistakes.

Congress could reasonably regard such damages remedies as counterproductive to ERISA's objective of encouraging plan formation. Congress' enactment of the Pension Protection Act of 2006, Pub. L. 109-280 (PPA) confirms that voluntary employer sponsorship of retirement plans is critical to the national policy of encouraging current workers to save for retirement. The PPA provides, *inter alia,* additional flexibility for employers who wish to increase participation rates in defined contribution plans through devices like automatic enrollment. The PPA also permits employers to take other measures, such as offering workers investment advice in some circumstances, to help employees achieve better overall financial returns in their 401k plan accounts. Regulations proposed by the Department of Labor are intended to provide

employers with guidance on these matters in the context of "employers' fiduciary responsibilities." Gov't Accountability Office, "Employer-Sponsored Health and Retirement Benefits: Efforts to Control Employer Costs and the Implications for Workers," GAO 007-355, at 35 (2007) available at www.gao.gov/new.items./007355.pdf.[5] The objective of these provisions would be undermined by the judicial creation of a new species of fiduciary breach litigation to be brought against sponsors of defined contribution plans. *See Jenkins v. Yager*, 444 F.3d 916, 919-23 (7th Cir. 2006) (rejecting claim that 401k plan administrator failed to monitor participant's investment choices in violation of § 404 of ERISA).

The Fourth Circuit's concern about the negative consequences of increased litigation against 401k plan sponsors, Pet. App. 24a, is consistent with this Court's recognition of the political compromises reflected in ERISA. *Mertens*, 508 U.S. at 262-63 ("There is . . . a 'tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs. . . . We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck'" (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981)). In this context, Congress' resolution of this tension is contained in § 502(a)(3), which authorizes an *equitable action* (but not

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[5] Certain provisions in the PPA are explicitly intended to encourage small employers, like DeWolff, to continue to sponsor retirement plans. Other Congressional legislation has had similar objectives. *See* Congressional Research Service, "Pension Sponsorship and Participation: Summary of Recent Trends," (Sept. 6, 2007) available at www.opencrs.com/rpts/RLK30122-2006 0831.pdf ("Congress has sought to encourage greater retirement plan sponsorship among small businesses mainly by easing the financial and reporting requirements associated with certain types of defined contribution pension plans," citing the *Revenue Act of 1978* (P.L. 95-600) and *Small Business Job Protection Act of 1996* (P.L. 104-188) as examples).

compensatory damages) to compel the plan administrator to follow an investment instruction. In light of the availability of swift equitable relief, a damages remedy of the kind advocated here could only be seen as undermining the creation of private sector retirement plans that Congress sought to encourage.

B. This Case does not Involve "Losses to the Plan" Within the Meaning of ERISA § 409

1. ERISA § 502(a)(2) authorizes a "participant, beneficiary or fiduciary" to bring a civil action for "appropriate relief under Section 1109 [Section 409] of this title." 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, states that "any person who is a fiduciary with respect to a plan . . . shall be personally liable to make good *to such plan any losses to the plan* resulting from" a breach of fiduciary duty. 29 U.S.C. § 1109(a) (emphasis added). LaRue's claim does not fit this definition.

LaRue's argument proceeds from the premise that an alleged loss in value to an individual's account balance (whether an actual out-of-pocket loss alleged in *Goeres*, or the claim for lost profits asserted here by LaRue) necessarily constitutes a separate and further injury to the Plan. That premise is mistaken in a case like this one where it is not even alleged (and inconceivable in any case) that the interest of any other participant in the Plan was affected by the fiduciary breach asserted. As a textual matter, LaRue's argument effectively asks the Court to amend § 409(a) to read that a fiduciary should be personally liable to make good "any losses ***incurred by an individual participant in*** the plan," irrespective of whether the Plan itself, or any other plan participants, can be said to have suffered any losses. There is no indication that Congress intended § 409 to extend to an individual claim for lost profits having no impact on any other plan participant, or, more broadly, on the Plan itself.

This Court has described ERISA's civil enforcement provisions as an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'" *Russell*, 473 U.S. at 146 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)). This Court has made clear that § 409 authorizes only a claim that "inures to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. Consistent with *Russell*, the Court has recognized that § 502(a)(2) "does not provide a remedy for individual beneficiaries." *Varity Corp.*, 516 U.S. at 515 (quoting *Russell*).

This construction of § 502(a)(2) is long-settled. Congress has not sought to override it, notwithstanding rulings by the lower courts declining to allow § 502(a)(2) to be converted into a vehicle for individual plan participants to collect damages.[6] *See Fox v. Herzog Heine Geduld Inc.*, No. 06-1333, 2007 WL 1113802, at *1 (3d Cir. April 16, 2007); *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006); *Magin v. Monsanto Co.*, 420 F.3d 679, 688 (7th Cir. 2005) (plaintiff could

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[6] Consistent with this understanding, the Department of Labor has, contrary to the position asserted here by the Solicitor General, conceded that § 502(a)(2) is not available in cases in which individuals seek a recovery for breach of fiduciary duty under § 502(a)(3). *See* Brief of Sec'y of Labor as *Amicus* Curiae Supporting Appellant, *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004) (No. 05-1415, 2003 WL 24309395); Brief of Sec'y of Labor as *Amicus* Curiae Supporting Appellant, *Green v. ExxonMobile Corp.*, 470 F.3d 415, 421 (1st Cir. 2006) (No. 06-1452) 2006 WL 3226460; Brief of Sec'y of Labor as *Amicus Curiae* Supporting Appellant in *Ostler v. OCE U.S.A., Inc.*, (No. 01-3801) (7th Cir. Jan. 14, 2000) n.8 at http://www.dol.gov/sol/media/briefs/ostlervOCE(A)-2-8-2002.pdf ("Although Sections 409 and 502(a)(2) of ERISA expressly permit the recovery of losses sustained by the plan as a whole, these provisions do not apply to losses sustained by individual participants. Fiduciary misconduct resulting in individual injuries can only be redressed by the recovery of equitable relief under Section 502(a)(3) of ERISA"). The Government makes no attempt to explain its change of position.

not recover "his personal enhanced severance benefits"); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234 (5th Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995); *Tullis v. UMB Bank, N.A.*, 464 F. Supp. 2d 725, 730 (N.D. Ohio 2006) (plaintiffs seeking "individualized compensatory damages to remunerate for their individual claims" may not recover); *Pfahler v. National Latex Co.*, 405 F. Supp. 2d 839 (N.D. Ohio 2005); Muir, 81 Iowa L. Rev. at 24 ("In *Massachusetts Mutual Life Insurance Co. v. Russell*, the Supreme Court determined that Section 409 and Section 502(a)(2) do not permit individual claimants to recover extra-contractual damages on their own behalf").[7] LaRue and his *amici* cite no authority for the notion that § 502(a)(2) should provide a cause of action for an individual seeking to hold a plan fiduciary personally liable in a case of simple negligence

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[7] Some courts have suggested, in what are known as the "stock drop" cases, that a claim can be brought under § 502(a)(2) on behalf of a subset of 401k plan participants even if the alleged fiduciary breach did not affect *every* plan participant. *See, e.g., Milofsky v. American Airlines, Inc.*, 442 F.3d 311 (5th Cir. 2006); *Graden v. Conexant Systems, Inc.*, -- F.3d --, No. 06-2337, 2007 WL 2177170 (3d Cir. July 31, 2007); *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005). Those cases involve systemic claims of fiduciary breach in circumstances where the alleged misconduct affected a substantial number of plan participants. Indeed, in those cases, the duty being breached is, in a very real sense, a breach of duty to the Plan itself. Here, by contrast, there is no suggestion that Respondents engaged in a pattern and practice of refusing to honor the investment directions made by any other plan participants. The Fourth Circuit was surely correct in concluding both that the stock drop cases are distinguishable and that its decision simply does not implicate the concerns presented in those cases. ("This case is much different from a § 1132(a)(2) action in which an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants . . . Here, by contrast plaintiff seeks to particularize the recovery to himself") (internal citations omitted). Pet. App. 6a.

affecting only one plan participant in circumstances that would not justify equitable restitution.[8]

LaRue's claim is the paradigm of an individual loss that cannot fairly be re-characterized as "losses to the Plan." The whole theory is about a loss (and a recovery) that is extrinsic to the Plan. This is a claim for speculative lost profits that never actually accrued to anyone, let alone anyone associated with the Plan. It is truly difficult to imagine a more individualistic type of claim. Moreover, there is no allegation of any breach of duty to the Plan in any meaningful sense.[9]

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[8] The Government suggests that, because ERISA's fiduciary duty obligations extend to an individual plan participant, relief should be available to LaRue here under § 502(a)(2). U.S. Br. 10. But every case relied on by the government is distinguishable, as each involves a situation in which the fiduciary received some economic advantage from the conduct in question. *See* Employee Benefits Sec. Admin., U.S. Dep't of Labor: *Fact Sheet: Retirement Security Initiatives* (Apr. 2007) at http://www.dol.gov/ebsa/newsroom/fsecp.html (describing *Chao v. Long* and *Chao v. IMDC Inc.*, where the Department of Labor brought cases alleging failure to forward plan contributions to individuals' accounts). Petitioner makes a similar argument, invoking various hypothetical situtions involving a plan fiduciary's duty to an individual plan participant. Pet. Br. at 23-24. Those examples are likewise distinguishable because each involves some type of fiduciary self-dealing or unjust enrichment not present here. This Court's decisions in *Mertens*, 508 U.S. 248 (1993), *Great-West*, 534 U.S. 204 (2002), and *Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006) teach that equitable restitution would be available in those circumstances.

[9] There is a substantial question as to whether LaRue even pled a valid cause of action for breach of fiduciary duty, in that the complaint neither identified the entity responsible for the alleged miscommunication nor alleged that the entity was acting in a fiduciary capacity with respect to that transaction. *See Pegram v. Herdrich*, 530 U.S. 211, 225 (2000) (fiduciary status is the threshold question in determining whether a claim of fiduciary breach is properly stated). *See also IT Corp. v. General American Life Ins. Co.*, 107 F.3d 1415, 1420 (9th Cir. 1997) ("[T]he power to err, as when a clerical employee types an erroneous code onto a computer screen, is not the kind of discretionary authority which turns an

Rather, the breach of duty alleged here is solely to LaRue.[10] Nor can this case be shoe-horned into a viable claim under § 502(a)(2) by recasting the nature of a potential recovery. Any recovery ultimately available to LaRue under this legal theory is one that would benefit *him* and him alone.[11]

The contrary argument made by the Government is unavailing. Based solely on the unremarkable observation that legal title to all assets in a 401k plan is held in the name of the plan, the Government reasons that any loss to an individual participant must also be viewed as "losses to the plan." U.S. Br. 8-9. The Government thus asks the Court to

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administrator into a fiduciary"); *Kyle Rys., Inc. v. Pacific Admin. Serv.*, 990 F.2d 513, 516-17 (9th Cir. 1993) (insurance company is not a fiduciary when it negligently administered claims under the plan). Nor did the complaint make a specific assertion as to the particular breach of ERISA's fiduciary duty rules allegedly made by either Respondent. For example, the complaint did not allege that Respondents "failed to monitor" the conduct of service providers to the Plan. *Cf. Jenkins v. Yager*, 444 F.3d 916, 919-23 (7th Cir. 2006).

[10] LaRue misreads the Fourth Circuit's reasoning on the issue of whether ERISA's fiduciary duty obligations extend to a single plan participant. The correctness of that general proposition is immaterial to the key fact that informed the lower courts' decisions in this case: LaRue is complaining about an alleged mistake that, by definition, affected him and him alone. Pet. App. 6a. LaRue and his *amici* are thus incorrect in arguing there is no principled basis to distinguish among fiduciary breaches affecting one individual and claims affecting a broader subset of plan participants. *See, e.g.*, Pet. Br. 23-27. The statute provides the answer: § 502(a)(2) provides redress for fiduciary breach claims alleging "losses to the Plan," while § 502(a)(3) permits an individual plan participant to recover "approproptiate equitable relief." *Mertens*, 508 U.S. at 253-54.

[11] That any recovery [illegible] available in this case would flow strictly to LaRue and not [illegible], as required by § 409, is confirmed by LaRue's decision to cash out of the Plan. Respondents' pending motion to dismiss the writ demonstrates that LaRue's decision leaves him without a legally cognizable interest in the recovery under the legal theory supporting the § 502(a)(2) argument, thereby mooting this case. MTD 3-4.

recharacterize LaRue's claim by imagining a kind of straw transaction where the recovery would be funneled through the Plan and then immediately into LaRue's pocket. But precisely because of the need for such funneling, this claim does not involve losses to the Plan. This is because the Government's argument proceeds on a false premise. The complaint asserts no allegation of any generalized losses to the Plan, and there is no basis on which to claim that any other plan participant is even indirectly affected. *See* BIO App. pp. 1a-4a.

Nor does the argument properly focus on the words of the statute. Respecting the different purposes reflected in the various subsections of § 502, the Court in *Russell* stated that § 502(a)(2) claims must be "brought in a representative capacity on behalf of the plan as a whole," in order to advance the "financial integrity of the plan." *Russell*, 473 U.S. at 142, n.9. LaRue's claim, unique to him, was not brought in any sort of representative capacity, nor with any conceivable goal of improving the financial condition of the Plan itself.

The Government's reading of § 502(a)(2) is also counterintuitive. If it were true that any claim of fiduciary breach could be brought by an individual under § 502(a)(2), there would be no need for the language Congress added in § 502(a)(3). *See Coan*, 457 F.3d at 262; *Heffner v. Blue Cross & Blue Shield of Alabama, Inc.*, 443 F.3d 1330, 1339 (11th Cir. 2006). *See also LaRocca v. Borden, Inc.*, 276 F. 3d 22, 28 (1st Cir. 2002).[12]

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[12] The § 502(a)(2) theory suffers from the additional problem of appearing to be mutually exclusive of the § 502(a)(3) claim. The Court in *Varity* characterized § 502(a)(3) as one of two catchall provisions in ERISA, available in cases where other subsections of § 502(a) would provide inadequate relief. *Varity*, 516 U.S. at 512. The Court expressed its expectation that in such cases "there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate'" within the meaning of § 502(a)(3). *Id.*, at 515. While this Court has not yet directly addressed the issue, lower courts have widely interpreted this

2. Because of the obvious weakness in the suggestion that a recovery for LaRue is *per se* a recovery to the Plan, LaRue and his *amici* labor to suggest that this case offers a separate "recovery" to the Plan incident to the individual recovery intended for LaRue. They claim, for instance, that a recovery here would go first to the Plan, to absorb Plan expenses, before the remainder would be allocated to LaRue. Pension Rts. Ctr. Br. 4; Law Profs. Br. 11-12. This claim is speculative.

Because LaRue did not enter the Plan document into the record,[13] the Court is unable to assess, for example, whether the Plan includes the critical features assumed by LaRue and his *amici*. It is thus speculative to assume that assets of individual participants in the Plan are, in fact, pooled. ERISA permits a 401k plan to have individual participant accounts, by which individuals make their own investment choices. *See* 29 C.F.R. § 2550.404c-1(a). Many defined contribution plans include this feature, and many such plans operate without any

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observation to mean that a § 502(a)(3) remedy is *not* available in a situation in which a plaintiff proceeds under another subsection of § 502(a). *See Korotynska v. Metropolitan Life Ins. Co.*, 474 F.3d 101, 105 (4th Cir. 2006); *Bowles v. Reade*, 198 F.3d 752, 759-60 (9th Cir. 1999); *Burke v. Pitney Bowes, Inc. Long-Term Disability Plan*, No. C04-4483, 2006 WL 13097, at *11 (N.D. Cal. Jan. 3, 2006). *But see Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 89 (2d Cir. 2001).

[13] LaRue's tactical litigation decision in this respect is consistent with the theory litigated in the district court. LaRue never suggested this case involved "losses to the Plan," and argued only that his claim for monetary relief could be characterized as appropriate equitable relief within the meaning of § 502(a)(3). LaRue thus had no reason to enter the Plan document into the record, or to develop otherwise the factual arguments now advanced in support of the theory made for the first time in the court of appeals. That LaRue chose not to make the claim in the district court is a good indication of its lack of merit. And, as the Fourth Circuit observed, Pet. App. 5a, the § 502(a)(2) argument was waived. *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004); *McCarthy v. Bruner*, 323 U.S. 673 (1944).

sort of pooling of plan assets. *See* "Pros and Cons of Self-Directed 401Ks," by the Financial Planning Association (Oct. 15, 2001) available at http://accounting.smartpros.com/x31218.xml (stating that participants in some types of plans must pay for the transactions costs out of their individual accounts). The Government's argument that the Plan provides for forfeitures to be allocated to other participants, U.S. Br. 14, is another assumption not supported by the record. It is likewise speculative to assume that the Plan includes a general trust account used to pay expenses incurred by the Plan. Nothing in either ERISA or the Internal Revenue Code requires that a plan be structured in that manner. *See generally* ERISA § 402. For all LaRue and his *amici* know, all Plan expenses are either paid entirely by DeWolff and/or charged to individual plan accounts.

Yet contrary assumptions are critical to the argument made by LaRue that § 502(a)(2) can be read to extend to an individual claim for lost profits in these circumstances. If, for example, assets in the Plan are *not* pooled, it is difficult to imagine how a potential loss in value to one participant's individual account could possibly affect the value of the assets held by other participants. For the same reasons, if LaRue and his *amici* are incorrect in assuming that the Plan has a general account from which plan expenses are paid, the notion that a recovery here would "inure to the benefit of the plan" falls away.

Moreover, even if such incidental benefits could accrue to the Plan at the margin, they would be insufficient to transform LaRue's extraordinarily personal attempt to recover alleged lost profits into a case that is really being pursued for the Plan. The Fourth Circuit thus correctly concluded that this case cannot properly be viewed as presenting "losses to the Plan" in the absence of any conceivable impact on other Plan participants. Pet. App. 6a. ("The measure of that recovery is a loss suffered by him alone").

3. The Government's reliance on ERISA § 404(c) does not advance LaRue's cause. Section 404(c) provides a defense for an entity that would otherwise be a plan fiduciary, as well as for an admitted fiduciary, where the plan meets the criteria set forth in the regulations implementing § 404(c). LaRue does not allege that the Plan was designed to comply with § 404(c), and there is no factual basis to assume otherwise. The Fourth Circuit's decision thus has nothing to do with a statutory exemption that was designed for a different type of plan. The court's decision hardly renders § 404(c) superfluous; it is simply not implicated here.

4. The Court's ERISA preemption jurisprudence, running from *Pilot Life* through *Davila*, shows a keen awareness of Congress' objective in enacting ERISA to encourage employers to continue to offer employee benefit plans. *Pilot Life*, 481 U.S. at 54 (ERISA "represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans"). *See Hutchison v. Fifth Third Bancorp.*, 469 F.3d 583, 589 (6th Cir. 2006) ("In addition, allowing [the] state-law claim to proceed might discourage the creation of employee benefit plans in the future"). Decisions in the ERISA preemption cases also reflect the Congressional concern that plan administration costs, including litigation costs, not threaten the solvency of benefit plans. *Davila*, 524 U.S. at 215. Those same concerns apply to pension plans. *See Russell*, 473 U.S. at 148, n.17; H. Conf. Rep. No. 93-1280 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5083, 5167, *and* 3 Legislative History of ERISA at 4673 (1976) (remarks of Senator Ullman) ("[P]ension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill," explaining that such a burden would be "self defeating" and "unfavorable" to the employees who are meant to benefit from the legislation).

The rise of defined contribution plans suggests that the Court should be particularly reluctant to create new remedies that would increase the cost of 401k plan administration. Defined contribution plans are increasingly replacing traditional defined benefit plans as the vehicle of choice for employers who choose to provide retirement benefits for their employees. Choice is the operative construct. Employer sponsorship of retirement plans, like medical plans, is entirely voluntary. *See* Muir, 81 Iowa L. Rev. at 51 (voluntary nature of employee benefit plans is a "unique aspect of ERISA"). Any development that would increase the cost of plan administration, including additional litigation costs, is at odds with the policy of encouraging employers to continue to provide retirement plans as a meaningful complement to the Social Security system for a substantial percentage of this country's current workers. *See Barrs v. Lockheed Martin Corp.*, 287 F.3d 202, 207-08 (1st Cir. 2002) ("increased burdens necessarily increase costs, discourage employers from offering plans, and reduce benefits to employees").

The increased cost of providing and obtaining fiduciary insurance is of particular concern in this context. *See* "Enron Debacle Causes Companies to Increase 401(k) Insurance." *Insure.com* (June 23, 2005) available at http://www.insure.com/business/ enron202.html; Jo Ann Abramson and David M. Gische, "The New Wave of Corporate Fiduciary Claims," American Bar Ass'n 33 Spring Brief 45 (2004) ("More problematic are the implications if these new ERISA claims are, in fact, successful [for insurers]. . . . [U]nderwriters, and the corporations they insure, need to respond now to the increased risk of exposure and costs that these lawsuits present"); Mark Casciari and Ian Morrison, *Should the Securities Exchange Act be the Sole Federal Remedy for an ERISA Fiduciary Misrepresentation of the Value of Public Employer Stock?* 39 J.Marshall L.Rev. 637, 656 (2006) (increased litigation against 401k plan sponsors will increase

the cost of fiduciary insurance and "increase the cost of providing benefits and thus may discourage employers from continuing to offer retirement plans or as generous retirement plans").

5. LaRue's effort to characterize his claim as providing a benefit to the Plan is hardly aided by his withdrawal from the Plan. Having cashed out, any recovery will clearly go directly to him: it cannot be funneled, even fictitiously, through an individual Plan account that no longer exists. LaRue recognizes the importance of this issue. In the district court, LaRue made much of the fact that he was (at that time) still a participant in the Plan, calling it an "important fact" for the district court to consider. BIO App. 44a. LaRue reiterated this point in the Fourth Circuit. In distinguishing the Eight Circuit's decision in *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593 (8th Cir. 2005) that a past participant could not recover relief under § 502(a)(3), LaRue stated, "what is key in distinguishing the outcome in *Calhoon* from the matter *sub judice* is that *Calhoon* was *no longer a participant in the plan, but LaRue is*." Brief for Appellant in *LaRue v. Dewolff, Boberg & Assoc*, 450 F.3d 470 (4th Cir. 2006) No. 05-1756, 2004 WL 3545170, at *29 (emphasis in original).

To be sure, LaRue and his *amici* now argue that LaRue remains a "participant" in the Plan. They are wrong. This Court interpreted the term "participant" in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) to mean that a former plan participant may pursue a claim if it can be established that she has "a colorable claim" to "vested benefits." Some courts have applied *Firestone* to hold that former participants who have accepted lump sum distributions of their benefits may not maintain a claim under § 502(a)(2). See *Crawford v. Lamantia*, 34 F.3d 28 (1st Cir. 1994); *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986) (*per curiam*) *cert. denied*, 479 U.S. 72 (1987). Other courts have applied a "but for" test and allowed former participants to

maintain a claim for benefits if it can be proven that plaintiffs would still be participants in the plan but for defendants' conduct. *See Swinney v. Gen. Motors Corp.*, 46 F.3d 512 (6th Cir. 1995); *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992); *Adamson v. Armco, Inc.*, 44 F.3d 650 (8th Cir. 1995); *In re Patterson Co., Inc. Securities Derivative & ERISA Litig.*, 479 F. Supp. 2d 1014, 1042-44 (D. Minn. 2007).[14] LaRue has no conceivable § 502(a)(2) claim under either test, as it is not even alleged that DeWolff had any role in LaRue's decision to cash out of the Plan two years after initiating this litigation.

The viability of LaRue's claim thus hinges on whether the remedy he seeks can be fairly characterized as a claim for benefits as opposed to a traditional claim for money damages. Some courts have put such claims in the former category, in cases where the alleged loss was caused by an intentional breach of fiduciary duty. Other courts have held that such claims seek damages that are not recoverable in an action brought under § 502(a)(1)(B). *See In re Patterson Companies*, 479 F. Supp. 2d 1014; *Evans v. Akers*, 466 F. Supp. 2d 371 (D. Mass. 2006), *appeal docketed*, No. 07-1140 (1st Cir. Jan. 22, 2007). The issue is currently pending before two other courts of appeals, as well as the First Circuit. *See Dickerson v. Feldman*, 426 F. Supp. 2d 130 (S.D.N.Y. 2006), *appeal docketed*, No. 06-1616 (2d Cir. Apr. 4, 2006); *Vaughn v. Bay Envtl. Mgmt. Inc.*, No. C03-5725, 2005 WL 2373718 (N.D. Cal. Sept. 26, 2005), *appeal docketed*, No. 05-17100

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[14] Plaintiffs in most of those cases proceed under § 502(a)(1)(B), which permits a participant to bring suit for benefits under the terms of the plan. Plaintiffs in other such cases have invoked § 502(a)(2). LaRue, of course, invoked neither.

(9th Cir. Nov. 1, 2005).[15] In part because LaRue did not proceed under § 502(a)(1)(B),[16] LaRue's claim is strictly for lost profits, and cannot be fairly characterized as a "colorable claim for vested benefits" within the meaning of *Firestone*.

6. The absence of a damages remedy for lost profits does not mean that LaRue lacked a remedy. Any failure to implement his instructions would give rise to a claim for swift and sure equitable relief: an injunction compelling the defendant to follow the instructions. LaRue claimed he gave instructions to change his investment allocations that, if honored, would have yielded substantial returns in the market. He claims the instructions were not followed—and two years later claims that he would have made a lot of money had the instructions been followed. But, even if true, LaRue was not without a remedy. If the plan administrator and/or its agents actually failed to follow his investment directions, a single telephone call to DeWolff should have prompted quick action. And, in the unlikely event there was further delay, an equitable claim to force the plan fiduciary to implement the investment requests would be straightforward.

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[15] The questions presented in cases like *Evans v. Akers* are antecedent to the questions on which *certiorari* was granted in this case. The Court may wish to await further developments in this area of the law before undertaking to resolve those issues.

[16] It is conceivable, as suggested by the ERISA Industry Committee (ERIC) as *amicus curiae* in support of Respondents, that LaRue could have filed a claim alleging a violation of § 502(a)(1)(B), seeking to "enforce his rights" under the terms of the plan. ERIC's *amicus* brief suggests that the second clause of § 502(a)(1)(B) may have been implicated by the conduct alleged here. Depending on the actual terms of the plan, a participant might be able to claim a right, under the terms of the plan, to have her investment instructions followed by the plan sponsor and/or a service provider to the plan. Moreover, had LaRue actually taken a distribution, he might have been able to pursue a claim for benefits under the terms of the plan, as provided in the first subsection of § 502(a)(1)(B). *Cf. Goeres v. Charles Schwab*, 220 Fed. Appx. 663 (9th Cir. 2007).

Because that is so, it is inconceivable that the order would not have been executed had LaRue simply picked up the telephone and called some-one.[17]

To create a claim for lost profits in this circumstance is to reward someone for not pursuing the claim for equitable relief Congress expressly stated is available here. Indeed, LaRue's argument in favor of a damages remedy could have the additional perverse consequence of making him ineligible for the equitable relief provided in § 502(a)(3), as the availability of a damages remedy is one of the traditional defenses to a claim for equitable relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

This Court can hold open the question whether an abject, purposeful failure to follow a clear instruction, following some pattern or practice, or based on some asserted policy potentially applicable to all plan participants, would give rise to a damages remedy. But it is clear enough that the kind of negligent failure to follow an individualized instruction in a single case, without more, cannot be regarded as creating "losses to the Plan" within the meaning of § 409.

C. LaRue's Theory Cannot be Reconciled with This Court's ERISA Jurisprudence

Affirmance is required for the independent reason that a ruling in favor of LaRue would fundamentally change the

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[17] In addition to bringing a claim under the second clause of § 502(a)(1)(B), it may also be that LaRue could have pursued a state law claim against the entity, unnamed in the complaint, allegedly responsible for not honoring his investment instructions. Such claims may not be preempted by ERISA. *See See Northcutt v. General Motors Hourly-Rate Employees Pension Plan*, 467 F.3d 1031 (7th Cir. 2006) (ERISA does not preempt claim based on contractual right); *Barker v. The Hartford Life and Acc. Ins. Co.*, 2007 WL 2192298 (N.D. Tex. July 31, 2007) (tort claim brought against insurance carrier, deemed not to be an ERISA fiduciary, not preempted). LaRue's failure to pursue such claims is nowhere explained.

assumptions that have guided the Court's ERISA preemption jurisprudence for more than thirty years. In *Pilot Life*, the Court struck down a state law providing a damages remedy for consumers who had been subject to unfair claims practices by insurers. *Pilot Life*, 481 U.S. 41. In numerous cases following *Pilot Life*, the Court has adopted an expansive reading of ERISA's preemption provisions. *See, e.g., Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133 (1990); *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999); *Metropolitan Life Ins., Co. v. Massachusetts*, 471 U.S. 724 (1985). In these cases, the Court has reemphasized that "Congress had not intended causes of action under ERISA itself beyond those specified in" Section 502. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 378 (2002). The Court in *Rush Prudential*, for example, expressly concluded that the Illinois statute at issue there was not preempted precisely because it did not "involve the sort of additional claim or remedy exemplified in *Pilot Life*." *Id.* at 380. This Court's unanimous decision in *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) settled the question. The Court held that, when a state cause of action is not completely independent from an ERISA cause of action it is preempted, even if the elements of the state claim are not completely duplicative of the ERISA cause of action. *Id.* at 215.

The Court explained the analytical basis for ERISA preemption in *McClendon*. There the Court reasoned that the Texas wrongful termination statute at issue was preempted because it "purports to provide a remedy for the violation of a right expressly guaranteed by § 510 and exclusively enforced by § 502(a)." *McClendon*, 498 U.S. at 144. As the Court explained in *Rush Prudential*, in *McClendon* "we had no trouble finding that Texas's tort of wrongful discharge, turning on an employer's motivation to avoid paying pension benefits, conflicted with ERISA enforcement; while state law duplicated the elements of a claim available under ERISA, it converted the remedy from an equitable one under

§1132(a)(3) (available exclusively in federal district courts) into a legal one for money damages (available in a state tribunal)." *Rush Prudential*, 536 U.S. at 379.

The Court's preemption cases thus hinge on the heretofore settled understanding that state law tort claims are preempted precisely because they seek remedies not available under § 502, which is the exclusive vehicle for pursuing claims against plan sponsors and their service providers. The fact that ERISA provides no damages remedy for these kinds of claims against sponsors of medical and disability benefit plans reflects a long-shared understanding. Had it been otherwise, after all, there would have been no reason for plaintiffs' attorneys to frame their claims for damages in state law terms. It would be surprising to learn now, more than thirty years after the passage of ERISA, that they need not have been so creative because the very same remedies were available in ERISA itself all along. While some might welcome the discovery of such buried treasure, there is no indication Congress intended such an outcome.

The Court's preemption jurisprudence properly recognizes that the Congressional intent to encourage employers to continue to maintain welfare benefit plans would be undermined if plaintiffs could invoke common law or state statutory remedies to pursue damages and other remedies beyond those set forth in § 502(a). Those same concerns apply to sponsors of retirement plans, including defined contribution plans. It would be anomalous in the extreme to allow such claims to be brought directly against employer sponsors of 401k plans under either § 502(a)(2) or § 502(a)(3), when such claims are not available against the sponsors of ERISA welfare benefit plans.

II. THE FOURTH CIRCUIT'S CONCLUSION CONCERNING THE SCOPE OF APPROPRIATE EQUITABLE RELIEF UNDER SECTION 502(a)(3) SHOULD BE AFFIRMED

A. The Fourth Circuit Concluded Correctly that Petitioner Sought Compensatory Damages.

The Fourth Circuit concluded that LaRue's claim was foreclosed by this Court's decisions in *Mertens* and *Great-West*. Pet. App. 9a. *See also, Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477, 482 (6th Cir. 2001) ("ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries"); Muir, 81 Iowa L. Rev. at 44.

The Fourth Circuit's analysis and holding is consistent with the vast majority of lower courts that have interpreted *Mertens* and *Great-West* to preclude the recovery of compensatory damages under § 502(a)(3), irrespective of clever drafting by plaintiffs' lawyers. *Goeres v. Charles Schwab*, 220 Fed. Appx. 663 (9th Cir. 2007); *Todisco v. Verizon Communications, Inc.*, No. 06-1957, 2007 WL 2231733 (1st Cir. Aug. 6, 2007); *Green v. ExxonMobil*, 470 F.3d 415 (1st Cir. 2006); *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006); *Ramsey v. Formica Corp.*, 398 F.3d 421 (6th Cir. 2005) (request to enjoin employer from reducing monthly benefits considered legal relief) *cert. denied*, 546 U.S. 815 (2005); *Millsap v. McDonnel Douglas*, 368 F.3d 1246 (10th Cir. 2004) (back-pay in a § 510 case is not equitable relief); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 945 (8th Cir. 1999); *Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994) (Section 502(a)(3) precludes recovery of monetary damages from a fiduciary); *In re Boston Scientific Corp.*, No. 06-10105-JLT, 2007 WL 2412164 (D. Mass. Aug. 27, 2007); *Wharton v. Duke Realty, LLP*, 467 F. Supp. 2d 381 (S.D.N.Y. 2006); *Pfahler v. National Latex Co.*, 405 F. Supp. 2d 839 (N.D. Ohio 2005). As the court in *Callery v. U.S. Life*, 392

F.3d 401, 409 (10th Cir. 2004) *cert. denied*, 546 U.S. 812 (2005) explained, the Supreme Court has given "rather emphatic guidance" that compensatory damages are not available under § 502(a)(3).

Irrespective of his characterization of the claim as seeking "make whole relief,"[18] LaRue's claim is a classic iteration of a legal claim for compensatory damages. It is measured by his alleged loss of potential market gains, rather than any gain alleged to have been achieved by either DeWolff or the Plan. The nature of the alleged loss—lost profits—is a quintessential damages remedy. *Terry*, 494 U.S. at 573 ("the money damages [of backpay] respondents seek are the type of relief traditionally awarded by courts of law"). And LaRue's claim bears no relationship to the kinds of claims typically regarded as equitable. The complaint did not seek any "categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *See Mertens*, 508 U.S. at 256. LaRue made no claim that can be characterized as equitable restitution. And there is no basis on which he could claim a constructive trust or an equitable lien.

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[18] LaRue admitted in the district court that the complaint sought compensatory damages in excess of what he claimed to be his actual loss. In the briefing on Respondents' motion for judgment on the pleadings, LaRue conceded: "Although the Defendants reference in their brief a figure of $150,000.00 which is contained in Plaintiff's complaint, that figure was intended to merely orient the court as to what Plaintiff believed the breach of fiduciary duty cost him at the time he filed the complaint." BIO App. 47a. LaRue acknowledged that his expert had calculated his claim for lost profits "at a little less than $100,000." *Id.* LaRue made no attempt to amend the complaint. This concession reveals that LaRue's § 502(a)(3) claim improperly seeks compensatory damages unavailable under § 502(a)(3), even if it can be presumed that some sort of make-whole relief is available after *Mertens* and *Great-West*. *See Millsap v. McDonnell Douglas*, 368 F.3d at 1260 ("the remedial purpose of § 502(a) is not to make the aggrieved employee whole") (citing *Mertens*, 508 U.S. at 253 and *Russell*, 473 U.S. at 138).

Indeed, LaRue and his *amici* effectively concede that his § 502(a)(3) claim is foreclosed by *Mertens* and *Great-West*. Pet. Br. 30. This is why they take the extraordinary step of asking the Court to overrule *Mertens*. Pet. Br. 40 n.26; Nat'l Emp. Lawyers Ass'n, Br. 15. But *Mertens* was correctly decided: When Congress invokes equitable remedies, it distinguishes them from legal remedies. Generally they do not overlap. And because the relief sought here is easily recognizable as legal, it simply cannot be re-characterized as equitable.

B. Petitioner's Argument that Surcharge was Typically Available in Equity is Without Merit.

The principal argument made by Petitioner and his *amici*—that LaRue should be permitted to pursue a claim for lost profits here because in 18th century England a common law trustee could be "surcharged" so that a plaintiff could receive money damages in equity—does not withstand analysis. This Court has already made clear that when Congress referred to equitable remedies in ERISA, Congress was referring to the range of remedies that are presently understood to involve "equitable relief," as opposed to remedies at law, *i.e.* damages. *Mertens*, 508 U.S. at 256. The origins of the distinction between equitable remedies and legal remedies are derived from the different types of remedies customarily available to the different branches of the divided bench. But we no longer have a divided bench. And when Congress in ERISA refers to legal versus equitable remedies, it means those remedies that are customarily regarded as legal versus those that are customarily regarded as equitable when exercised by the federal courts to which Congress assigned jurisdiction over ERISA claims. There really is no question but that the lost profits sought here are, in every ordinary modern use of the term, damages.

To this, Petitioner and his *amici* respond that all suits against trustees were historically equitable, and therefore, if

the remedy is available against the trustee, it must be an equitable remedy. But we know this not to be the case under ERISA because Congress did indeed establish what are clearly damages remedies against trustees in certain circumstances. *See* 29 U.S.C. §§ 1132(g)(2)(E), 1451(a)(1), 1024(a)(5)(C) and 1303(e)(1). And there is no basis for the suggestion that remedies are somehow equitable merely because each and every claim available against a trustee is equitable. Under LaRue's theory, for instance, there would have been no need for § 502(a), because almost everything under the sun might be available under § 502(a)(3). In *Mertens*, this Court expressly rejected the notion that any remedy available against the trustee, such as remedies available in equity under the heading of the "clean-up doctrine," should be regarded as an appropriate equitable remedy under § 502(a)(3). *Mertens*, 508 U.S. at 257-58.[19] That there were many reasons why historic courts of equity would seek to expand their powers to include classical legal remedies—often to avoid multiple proceedings in order to provide relatively complete relief—is not surprising. But that hardly changes the modern understanding of the fundamental difference between legal and equitable remedies. Claims for damages were "peculiarly within the province of the law courts." *Millsap v. McDonnell Douglass*, 368 F.3d. 1246, 1254 (10th Cir. 2004), (citing *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 710-11 (1999)).

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[19] Lower courts have faithfully followed *Mertens*, recognizing that one cannot simply re-label a claim for money damages as "surcharge" and thereby make it an appropriate equitable remedy in an ERISA case. *Knieriem v. Group Health Plan*, 434 F.3d 1058, 1064 (8th Cir. 2006) (rejecting claim for money damages on both surcharge and restitution theories); *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006) (rejecting the notion that artful pleading will permit the transformation of freestanding claim for money damages into one for equitable relief); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511, 612 (S.D. Tex. 2003) ("'Make-whole' relief for a claim of breach of fiduciary duty by a trustee cannot cloak a claim for compensatory damages").

Moreover, LaRue and his *amici* exaggerate in suggesting that surcharge was a typical remedy available against a trustee, and would have been available in a case like this. There is scant historical authority to support the assertion that surcharge was available in a case, like this one, involving no actual out-of-pocket losses by the plaintiff. The authorities cited by LaRue describe surcharge as a discretionary remedy intended to provide a plaintiff with an award of monetary relief from a trustee to compensate the plaintiff for losses actually sustained as a result of the trustee's breach of duty. 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 205, at 237 (4th ed. 1987) ("When the trustee commits a breach of trust, the beneficiary . . . can charge the trustee with any loss that resulted"); Restatement (Second) of Trusts § 205 (1959) ("If the trustee commits a breach of trust, he is chargeable with . . . any loss or depreciation in value of the trust estate resulting from the breach of trust").

The sum total of LaRue's argument that surcharge was typically available in equity in a case of lost profits caused by a ministerial mistake is a citation to a comment in the Restatement of Trusts and a 1937 decision by a New Jersey court, *Gates v. Plainfield Trust Co.*, 194 A. 65 (N.J. 1937). (Pet. Br. 34; U.S. Br. 19).[20] Yet *Gates* hardly supports the notion advanced by LaRue. The lower court opinion in *Gates* explains that the "improper investments" alluded to by the appellate court involved self-dealing by the trustee. The defendant trust company in *Gates* had been investing trust funds in a mortgage company in which the trustee had a considerable financial interest. The trust company had acquired 51 percent of the capital stock of the mortgage company and

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[20] LaRue's additional authorities are *dicta* from decisions that either do not actually analyze surcharge, or are inapposite. For example, in *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), "The contentions are solely as to administration and restoration of corpus." *Id.* at 467. The Court did not surcharge, or even analyze whether it could surcharge, the trustees in that case.

many of the trust company's own officers and directors served as officers and directors of the mortgage company. *Gates*, 191 A. 304, 316 (N.J. Ch. 1937), *aff'd*, 194 A. 65 (N.J. 1937). Thus, the improper investments leading to a loss in this case involved self-dealing and conflicts of interest. *Gates* thus illustrates the historical reality that surcharge was often granted in cases where the trustee had obtained ill-gotten gains through self-dealing or other affirmative misconduct, or other situations where traditional equitable restitution was appropriate.

Other authority suggests that LaRue overstates the point. For example, LaRue cites *Mosser v. Darrow*, 341 U.S. 267 (1951) for the proposition that surcharge functions as a sanction as well as a form of compensation. In that case, the Court held that surcharge was appropriate where a trustee intentionally approved self-dealing by his agents, allowing them to trade the trust's securities in companies in which they had interests. *Id.* at 269. The Court found that the trustee's actions were "willful and deliberate," and that the self-dealing was forbidden. *Id.* at 272. The Court explained, "that which the trustee had no right to do he had no right to authorize, and that the transactions were as forbidden for benefit of others as they would have been on behalf of the trustee himself." *Id.* at 272.[21]

The authorities do confirm that claims of these types were brought in a court of equity: "Such damages were available only in courts of equity because those courts had exclusive

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[21] LaRue also cites the Restatement of Trusts § 205 cmtg. Yet this comment confirms that LaRue and his *amici* exaggerate the proposition that surcharge was a common practice in the days of the divided bench. The comment simply states that a court in equity may excuse a trustee from liability when that trustee has not acted in bad faith. In this instance, LaRue does not assert that Respondents acted in bad faith, or even with "supine negligence." *Mosser*, 341 U.S. 272. Thus, the Restatement contemplates that which is evident in *Gates* and *Mosser*: surcharge was generally available only when the trustee acted in bad faith.

jurisdiction over actions involving a trustee's breach of his fiduciary duties," regardless of the characterization of the damages. *Terry*, 494 U.S. at 571, n.8. In this way, surcharge is similar in origin to the clean-up doctrine: both served as vehicles that allowed courts of equity to award legal remedies in particular circumstances. The fact that a court of equity was empowered to award monetary relief, however, does not transform the remedy from legal relief to equitable. A monetary award may be characterized as an equitable remedy if it is found to be an action for disgorgement of improper profits or "incidental to or intertwined with injunctive relief." *Terry*, 494 U.S. at 571. Because LaRue does not allege that defendants have been unjustly enriched, nor does he bring the claim for monetary damages as a claim appurtenant to an equitable claim, LaRue's claim is legal in nature. As the Court in *Terry* held, because "the remedy respondents seek has none of the attributes that must be present before we will find an exception to the general rule and characterize damages as equitable, we find that the remedy sought by respondents is legal." *Id.* at 570.

LaRue's summary of the relief available in 18th century England thus by no means establishes that surcharge was "typically available" in equity.[22] To the contrary, it confirms that a damages remedy was the exception to the general rule that claims for monetary relief were brought exclusively in the law courts and were not "typically available" in equity. That there is some authority for the notion that the chancellor

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[22] LaRue's surcharge argument is further weakened by the inconvenient (to him) historical reality that a claim in equity is subject to all equitable defenses, including laches. LaRue's principal authority on this point thus recognizes: "The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable." Restatement (Second) Trusts § 219. LaRue's decision to wait suggests that the chancellor would have "done equity" and dismissed a claim for surcharge on the basis of laches.

may have been empowered to award monetary relief against a trustee under the label of surcharge hardly makes it typical. By definition, a remedy that is available on occasion is not "typical."

In this context, the Court's delineation in *Mertens* of the remedies typically available in equity, 568 U.S. at 256, is an accurate taxonomy of claims followed in the days of the divided bench. Moreover, this Court has acknowledged that "trust law does not tell the entire story" in cases of ERISA statutory interpretation. *Varity*, 516 U.S. at 497. The Court has reminded the lower courts to "apply common-law trust standards 'bearing in mind the special nature and purpose of employee benefit plans.'" *Varity*, 516 U.S. at 506 (quoting H.R. Conf. Rep. No. 93-1280 at 302, 3 Leg. His. 4569). As one court has observed, "[o]rdinary trust principles cannot be transferred wholesale, and, where ERISA itself specifies [the requirement], courts must be especially cautious in creating additional ones." *Barrs v. Lockheed Martin Corp.*, 287 F.3d 202, 207 (1st Cir. 2002). *See Callery*, 392 F.3d at 405-06; *Moore v. Amer. Fed. of Television & Radio Artists*, 216 F.3d 1236, 1244 n.17 (11th Cir. 2000) ("[W]hile it is obvious that ERISA is informed by trust law, the statute is, in its contours, meaningfully distinct from the body of the common law of trusts. A method of interpretation consonant with this realization will reject the unselective incorporation of trust law rules into ERISA"). However one comes out after rummaging "through dusty attics of ancient writs," *Terry*, 494 U.S. at 575 (Brennan, J. concurring) LaRue suggests no basis for reversing *Mertens* and *Great-West* and authorizing a new species of damages remedies.

The very effort LaRue makes to distinguish surcharge from damages shows how hard it would be to accommodate this claim within the ERISA framework. LaRue asserts that surcharge is uniquely equitable because it was entirely discretionary. Outside of the classic area of injunctive relief, such discretionary remedies do not translate well to our modern

scheme of jurisprudence. Modern judges understand that a claim for damages is, unlike a request for injunctive relief, inherently obligatory—the plaintiff proves up her claim and recovers the damages to which she is entitled.[23] The notion that money remedies are discretionary does not fit well within that scheme. Congress could not have easily intended the marginal power of the chancellor to provide for a specific equitable remedy to be imported wholesale into the 20th (and now 21st) century. There surely is no indication Congress has yet intended ERISA to encompass a whole new jurisprudence of discretionary damages remedies against sponsors of 401k plans.

CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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September 11, 2007

[23] LaRue is surely hoping for an obligatory remedy here, with damages awarded in the full amount permitted by the evidence he would adduce at trial. And, if LaRue were allowed to replead his case and start over, he, and others like him, would surely seek to bring damages claims before a jury, with a Seventh Amendment-based argument that ERISA claims for legal damages are to be tried to a jury. The argument has already been made in the lower courts. *See Ellis v. Rycenga Homes, Inc.*, 2007 WL 1032367 (W.D. Mich. Apr. 2, 2007); *Spano v. Boeing Co.*, 2007 WL 1149192 (S.D. Ill., Apr. 18, 2007); *Abbott v. Lockheed Martin Corp.*, 2007 WL 2316481 (S.D. Ill., Aug. 13, 2007). This Court should reject LaRue's implication and confirm the reasoning in *Mertens* that § 502(a) is not intended to permit ERISA plaintiffs to bring claims for damages before juries.

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Charleston Division

Civil Action No. 2:04-1747-18

JAMES LARUE,

Plaintiff,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., AND DEWOLFF, BOBERG & ASSOCIATES EMPLOYEES' SAVINGS PLAN,

Defendants.

DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT

For their Answer to Plaintiffs Complaint, Defendants DeWolff, Boberg & Associates, Inc. ("DBA") and DeWolff, Boberg & Associates Employees' Savings Plan ("DBA Savings Plan"), by counsel, make the following statements and raise the following defenses:

Answering specifically the allegations contained in the numbered paragraphs of the Complaint:

1. Defendants admit the allegations of Paragraph I.

2. Defendants admit that DBA is a corporate entity organized under the laws of the State of South Carolina with its principal place of business in Richardson, Texas. Defendants further admit that DBA does business in Charleston, South Carolina. Defendants deny the remaining allegations of Paragraph II.

3. Paragraph III states a legal conclusion which requires no response. To the extent a response is required, Defendants admit that Defendant DBA Savings Plan is a retirement plan subject to regulation under ERISA.

4. Paragraph IV states a legal conclusion to which no response is required.

5. Defendants admit that Exhibit A to Plaintiffs complaint is the Summary Plan Description for the DBA Savings Plan that was issued in January 2002. Defendants admit that Defendant DBA Savings Plan is a retirement plan subject to regulation under ERISA in which certain former and current DBA employees participate. Defendants deny the remaining allegations of Paragraph V.

6. Defendants admit the allegations of Paragraph VI.

7. Defendants admit that Plaintiff is a participant in the DBA Savings Plan and has participated in the Plan since 1993. Defendants deny the remaining allegations of Paragraph VII.

8. Defendants admit that participants in the DBA Savings Plan are permitted to direct the investment of their contributions to the Plan in accordance with the procedures and requirements established by the Plan Administrator or its agents. Defendants deny the remaining allegations of Paragraph VIII.

9. Defendants admit that in 2001 Plaintiff requested that certain changes be made with respect to his then-current and future investments in the DBA Savings Plan. Defendants further admit that Plaintiff subsequently rescinded his request that such changes be implemented. Defendants deny the remaining allegations of Paragraph IX.

10. Defendants deny the allegations of Paragraph X.

11. The allegations of Paragraph XI state a legal conclusion to which no response is required. To the extent a re

sponse is required, Defendants deny the allegations of Paragraph XI.

FIRST CAUSE OF ACTION

12. Defendants incorporate by reference their responses to Paragraphs I through XI.

13. Defendants admit that DBA is the Administrator, and as such, a fiduciary of the DBA Savings Plan. Defendants admit that Defendant DBA is responsible for fulfilling the obligations of an administrator as they are defined under the DBA Savings Plan. Defendants deny the remaining allegations of Paragraph XIII.

14. Defendants deny the allegations of Paragraph XIV.

15. Defendants deny the allegations of Paragraph XVIII.

16. Defendants deny each and every allegation in the Complaint not specifically admitted herein.

17. Plaintiffs prayer for relief requires no response. To the extent a response is required, Defendants deny that Plaintiff is entitled to any relief whatsoever.

For A First Affirmative Defense

Plaintiffs Complaint fails to state a claim upon which relief can be granted.

For A Second Affirmative Defense

Plaintiffs claims are barred, in whole or part, by his failure to exhaust his administrative remedies.

For A Third Affirmative Defense

Plaintiffs claims are barred, in whole or part, by the doctrine of unclean hands and/or other equitable doctrines.

For A Fourth Affirmative Defense

At all relevant times to this action, Defendants acted with due care and complied with applicable statutory, regulatory and common law requirements.

For A Fifth Affirmative Defense

Plaintiffs Complaint fails, in whole or in part, because Plaintiff has waived the right, if any, to pursue his claims by reason of his own actions or course of conduct.

For A Sixth Affirmative Defense

Plaintiff has failed to mitigate his damages, if any, as required by law.

For A Seventh Affirmative Defense

Plaintiffs Complaint is barred, in whole or part, by the statute of limitations.

Respectfully submitted,

/s/ Steven M. Wynkoop
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Employees' Savings Plan

July 19, 2004